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Clearly there is an entirely different cause of action introduced when B is joined to the original defendant.¹⁰

It seems to be the element of surprise to the defendant which forbids the amendment where the cause of action is "wholly" changed by it, for, in *Ramirez v. Murray*, *supra*, the court said that if the amendment were allowed, the defendant would find himself in court to answer a charge concerning which he had never been summoned. But to allow the amendment is a matter within the discretion of the trial court and injustice could always be avoided by granting a continuance, as is done in any other case of an amendment introducing a new element into the case whereby the defendant is surprised.¹¹ The solution of the difficulty will be found in giving full scope to the statutory provision by permitting any amendment to be made which is in furtherance of justice.¹²

B. B. B.

Practice—Service of Summons on Corporation Whose Officers Have Departed from the State—The Supreme Court of California in the case of *McKendrick v. Western Zinc Mining Company and Tehama Mining Company*¹ has held that in an action against a domestic corporation, "all of whose agents and officers upon whom service can be made,—its actual body in point of fact, for this purpose—have departed from the state,—the corporation itself, though still a legal resident of the state and constructively present therein, has departed from the state, within the purview of section 412 of the Code of Civil Procedure."

Such a doctrine is, we believe, unsupported by authority. It has always been considered that though the directors of a corporation are more than mere agents,² the officers stand in a position little, if any, different from that of other agents and are in no sense the body of the corporation.³ It had seemed equally well established that inasmuch as a corporation cannot exist except under the authority of the laws of the particular jurisdiction creating it,⁴ it cannot possibly depart from the state where alone those laws have effect and operation.⁵

¹⁰ *Roberts v. Atlanta Real Estate Co.*, (1903) 118 Ga. 502, 45 S. E. 308.

¹¹ *Polk v. Coffin*, (1858) 9 Cal. 56; *Lewis v. Lanphere*, (1875) 79 Ill., 187; *Litchfield Coal Co. v. Taylor*, (1876) 81 Ill., 590; *Miszner v. Siter*, (1859) 23 Tex. 621; *Peterson v. Metropolitan Street Ry. Co.*, (1908) 211 Mo. 498; 111 S. W. 37.

¹² *Hilton v. Osgood*, (1881) 49 Conn. 110; *Clover etc. Milling Co. v. Abilene Milling Co.*, (1909) 136 Mo. App. 365, 116 S. W. 1112; *Merriman v. City of Springfield*, (1910) 142 Mo. App. 506, 127 S. W. 122; *Litchfield Coal Co. v. Taylor*, *supra*.

¹ (Supreme Court, California, Feb. 27, 1913) 45 Cal. Dec. 302.

² *Maynard v. Fireman's Fund Insurance Co.*, (1867) 34 Cal. 48.

³ *Blen v. Bear River etc. Co.*, (1862) 20 Cal. 602, 81 Am. Dec. 132; *Bank of Healdsburg v. Bailhache*, (1884) 65 Cal. 327, 332, 4 Pac. 106; *California Winemakers' Corporation v. Sciaroni*, (1903) 139 Cal. 277, 72 Pac. 990; *Lowe v. Yolo County etc. Water Co.*, (1910) 157 Cal. 503, 512, 108 Pac. 297.

⁴ *Moran v. Ross*, (1889) 79 Cal. 159, 21 Pac. 547.

⁵ *American etc. Wireless Co. v. Superior Court*, (1908) 153 Cal. 533,

The validity of the service of the summons in this case, however, does not depend upon finding that the corporation had departed from the state. In an action against a domestic corporation the Code of Civil Procedure, section 411, provides that "the summons must be served by delivering a copy thereof to the president, cashier or managing agent thereof." Section 412 provides: "Where the person on whom service is to be made . . . has departed from the state" and it appears "that a cause of action exists against the defendant in respect to whom the service is to be made" service may be made by publication. This language seems to indicate with sufficient clearness that the person referred to is not the defendant but one of those persons to whom, under section 411, a copy of the summons must be delivered. If the legislature had meant the defendant it could readily have said so, or if that construction were compatible with justice and sound policy it might prevail. If such a construction were adopted, however, there could be no service of summons in an action against a domestic corporation, against a minor under the age of fourteen years, against an insane person under guardianship, or against a city, county or town where the person designated to receive service had departed from the state,⁶ unless the anomalous reasoning adopted in the principal case is followed. It would seem that this is a case for the application of the rule that where a statute "is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense and wise policy, the former should be rejected and the latter adopted."⁷

B. B. B.

Trusts—Discretion in Applying Fund for Maintenance, Etc., Does Not Make Discretionary Trust in Real Property.—Discretionary trusts in real property are invalid in California. The trust, by the rule given in *Estate of Sanford*,¹ must be imperative, and without discretion on the part of the trustee as to its execution, otherwise it is void.

Does this rule apply where the trustee is to have "full power and discretion" in applying the income of the trust fund to the education, maintenance and support of a minor up to his majority? Is it to be considered that the variation that the trustee is empowered to make in applying the income or part of it to these purposes constitutes the trust a "discretionary" one, and therefore void?

This was the question raised in *Hornung v. Sedgwick*,² where it was held that such a trust was valid and did not conflict with the rule as to discretionary trusts. The language of the trust instrument gave the trustee power to pay out of the net income of the realty in trust,

96 Pac. 15; *Bank of Augusta v. Earle*, (1839) 38 U. S. (13 Peters) 517, 588; *Merrick v. Brainard*, (1860) 38 Barb. 574; *State v. Illinois Central Ry. Co.*, (1910), 246 Ill. 188; 92 N. E. 814; *In re Wilmer's Estate*, (1912) 138 N. Y. S. 649.

⁶ See section 411, Code of Civ. Proc. (Cal.).

⁷ *In re Mitchell*, (1898) 120 Cal. 384, 52 Pac. 799.

¹ (1902) 136 Cal. 97, 68 Pac. 494.

² (Feb. 6, 1913) 45 Cal. Dec. 170, 130 Pac. 212.